IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA, 1929

WP(C).No. 8708 of 2007(J)

PETITIONER:

K.V.MATHAI, AGED 64 YEARS,
SON OF VARKEY RESIDING AT THALAMATTATHIL HOUSE,
RAMAMANGALAM P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.H.B.SHENOY
SRI.B.ASHOK SHENOY
SMT.LAKSHMI B.SHENOY
SRI.ABU MATHEW

RESPONDENTS:

1. STATE CO-OPERATIVE ELECTION COMMISSION,
THIRUVANANTHAPURAM.

2. THE ASSISTANT REGISTRAR OF CO-OPERATIVE
SOCIETIES (GENERAL), MUVATTUPUZHA.

3. THE INSPECTOR OF CO-OPERATIVE SOCIETIES,
PAMPAKUDA, ERNAKULAM DISTRICT.

4. RAMAMANGALAM SERVICE CO-OPERATIVE BANK
LTD.,NO.2156 REPRESENTED BY ITS SECRETARY,
RAMAMANGALAM P.O., ERNAKULAM DISTRICT.

BY ADV. SRI.P.V.BABY
SRI.R.KIRAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/03/2007, THE COURT ON 28/03/2007 DELIVERED THE FOLLOWING:

W.P(C).No. 8708/2007

APPENDIX

PETITIONER'S EXHIBITS:

P1. COPY OF THE BYE-LAWS OF R4.

P2. COPY OF THE REPRESENTATION DTD.24.2.07 OF R1.

P3. COPY OF THE RESOLUTION NO.III DATED 1.3.07.

P4. COPY OF THE NOTIFICATION DTD.2.3.2007.

Sdk+

///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

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W.P.(C).No.8708 of 2007

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Dated this the 28th day of March, 2007

J U D G M E N T

In this writ petition a member of a society is challenging the notification issued for election to the Board of Directors of the Society on the ground that although the bye-laws of the Society specifically stipulates that election shall be on ward basis, without delimitation of the wards for which election is to be conducted by the general body which alone had the jurisdiction to do so, the present Director Board has adopted a resolution to conduct the election and to request the State Co-operative Election Board to appoint a returning officer which delimitation was done by the Director Board without jurisdiction on the basis of which the election notification has been issued. The facts necessary for disposal of the writ petition which are not at all in dispute, may be summarised as under.

2. The period of office of the present Director Board of the 4th respondent Society which is a Federal Society, expires on 1.4.2007. On 27.1.2007, the present Board of Directors adopted a resolution to conduct the election to the next Director Board on 31.3.2007 and to request the State Co-operative Election Commission to appoint a returning officer for conducting the election. On 24.2.2007 the petitioner filed Ext.P2 representation before the Election Commission pointing out that as per Clause 31(b) of the Bye-laws of the Society, elections to the Board of Directors can be only on ward basis and since the general body of the society which was vested with the power of delimitation of wards, have not done it, no election could be conducted before the general body conducts such delimitation of wards. But by Ext.P3 resolution dated 1.3.2007, the Director Board itself decided to have 7 wards, delimitation of which was also done by the said resolution. In accordance with such delimitation of

wards, Ext.P4 election notification has been published which is challenged by the petitioner as arbitrary and illegal.

3. The 4th respondent Society has filed a counter affidavit justifying the action of the Director Board and Ext.P4. According to them, despite bye-law 31(b), hitherto the elections to the Director Board have been conducted without delimitation of the area of operation of the Society into wards, including the last election. In keeping with the practice Ext.R4(a) resolution for conducting election and for requesting the Election Commission to appoint a returning officer was forwarded to the Election Commission by Ext.R4(b). However, on the basis of Ext.P2 complaint of the petitioner, by Ext.R4(c) dated 27.2.2007, the Election Commission directed the Society to fix the wards and to inform the office of the Election Commission. Accordingly, on 1.3.2007 the Director Board fixed the wards by Ext.R4(d) resolution and intimated the Election Commission regarding such

fixation, on the basis of which the Election Commission has issued the election notification which has been published as per Ext.P1. They assert that the Director Board has the power to fix the wards for election. They also contend that since the election process has already commenced the only remedy available to the petitioner is to file an election petition after the election is over and he cannot validly maintain a writ petition under Article 226 of the Constitution of India challenging the election process. They also point out that during the last election also the petitioner had filed an election petition in which the contention of want of delimitation of wards was taken which was rejected by the Arbitrator and the revision before the Tribunal was also dismissed.

4. The counsel for the petitioner argued that since the election process, which started by the resolution dated 27.1.2007, is *ab intio* void for want of delimitation of wards, being in violation of the bye-laws of the Society, the petitioner is

certainly entitled to invoke the jurisdiction of this Court under Article 226 for correcting a patent illegality which goes to the root of the election process itself. Regarding the earlier election petition he contends that the same was dismissed on certain technical grounds and since the term of the office of that Director Board is due to expire this month, the petitioner did not prosecute the same, which is no bar for the petitioner to take up the question before the election notification itself was published.

5. First I will deal with the contention of the counsel for the 4th respondent that since the election process has already commenced the remedy of the petitioner lies in filing an election petition after the election is over and he cannot challenge the Election notification under Article 226. Counsel refers to the decision of the Supreme Court in Gujarat University v. N.U. Rajguru (AIR 1988 SC 66) particularly paragraph 6 thereof, which reads thus:

> "6. It is well settled that where a statute provides for election to an office, or an authority or institution and if it further provides a machinery or forum for determination of dispute arising out of election, the aggrieved person should pursue his remedy before the forum provided by the statute. While considering an election dispute it must be kept in mind that the right to vote, contest or dispute election is neither a fundamental or common law right instead it is a statutory right regulated by the statutory provisions. It is not permissible to invoke the jurisdiction of the High Court under Art.226 of the Constitution by-passing the machinery designated by the Act for determination of the election dispute. Ordinarily the remedy provided by the statute must be followed before the authority designated therein. But there may be cases where exceptional for extraordinary circumstances may exist to justify by-passing the alternative remedies. In the instant case, there existing no circumstance justifying departure from the normal rule as even the challenge to the validity of statute 10 was not pressed by the respondents before the High Court."

While at it, I may now itself note that this decision itself provides that in exceptional circumstances this court can interfere although ordinarily the remedy provided by the statute must be followed before the authority designated therein.

6. The Supreme Court of India had in the decision in Election Commission of India v. Ashok Kumar [(2000) 8 SCC 216] considered the scope of interference of the High Court, in election matters

under the Representation of People Act, to which the embargo under Article 329 of the Constitution of India, against interference by courts applies and laid down the following principles in paragraph 32 thereof:

> "32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:
>
> (*1*) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.
>
> (*2*) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.
>
> (3) <u>Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.</u>
>
> (4) Without interrupting, obstructing or delaying the progress of the election proceedings,

> judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.
>
> (5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329 (b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Case has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

7. I shall now examine whether in the light of the principles laid down in the above decision, I am justified in interfering with Ext.P1 election notification in this writ petition.

8. Ext.P1 is the Bye-laws of the Society. Clause 31(b) stipulates that there shall be 9 members in the Director Board of which two shall be nominees of Deputy Registrar and that the election

to the Director Board shall be ward based. The Bye-laws do not specifically provide for the modality of fixation of wards. However, under clause 27(1)(a), the general body of the Society is vested with the power to conduct elections to the Director Board and under clause 27(7) it is the general body to exercise all functions in accordance with the Bye-laws.

9. Clause 42 stipulates the powers and duties of the Director Board. The 4th respondent points out that the power of the Director Board for delimitation of wards can be traced to sub clauses (24) and (39) of clause 42 of the bye-law. Sub clause (24) stipulates framing of business rules and election rules (working conditions) necessary for the efficient functioning of the Society and to obtain permission from the Deputy Registrar for such rules. Under Sub Clause (29) of clause 42 it is the duty of the Director Board to do all such things that may become necessary for carrying out the objects of the society and to administer the

Society.

10. The 4th respondent has no case that they have framed business rules or election rules and obtained approval of the Deputy Registrar or Joint Registrar for the same. As such, I am unable to see how sub clause 24 of clause 42 would enable the Director Board to fix the wards for the purpose of election of the Society. Sub Clause 39 also cannot be the source of power for the same since it only refers to the administration of the Society.

11. When clause 31(b) stipulates that the election to the Director Board shall be on ward basis it means that the 7 members of the Board out of the 9 of which 2 are nominated members should represent 7 wards. That means the area of operation of the Society has to be delineated into 7 wards and a member each has to be elected for each ward. This is like delimitation of constituencies in elections to the Parliament, State Assemblies and the local bodies. In those elections the delimitation is done by election commissions which

are independent bodies who are not controlled by the party in power. That would show that since delimitation is very fundamental to the elections, the law makers wanted to have the same done independently by a body which cannot be influenced by the party in power who may have their own agenda which may not reflect the will of the people. In so far as a co-operative society is concerned, although there is a Co-operative Election Commission appointed under the Kerala Co-operative Societies Act, the Act and Rules do not envisage such a function on the Co-operative election Commission for delimitation of wards. This is clear from the fact that by Ext.R4(c) the Election Commission themselves directed the Director Board to inform the Commission regarding the delimitation of wards. They also rejected the request of the Director Board to conduct the election treating the entire area of operation as one ward, which the Board stated was impracticable.

12. Section 27 of the Act stipulates that the

general body of the members of the Society is the ultimate authority in respect of the affairs of the Society subject of course to the Act, Rules and the bye-laws, whereas the proviso to Section 27 saves only those powers of the committee which are conferred by the Act, Rules or the bye-laws, meaning thereby that unlike the general body which can exercise all those functions which are not prohibited by the Act, Rules and the Bye-laws of the Society, the managing committee can exercise only those powers which are conferred on it. In other words, in respect of matters not covered by the Act, Rules or bye-laws it would be for the general body to take decisions and not the managing committee/Director Board.

13. Clause 27(1)(a) vests the powers regarding conduct of elections to the Director Board of the Society on the general body of the Society. Delimitation of wards, being a very vital aspect of the election, in the absence of an independent statutory body to do that, I am of opinion that,

that could only have been done by the general body and the Director Board in power could not have been trusted with the same, if the elections have to be free and fair, especially in view of the dirty politicking now-a-days prevalent in Co-operative Societies, which according to me, is slowly eroding the democratic values of the co-operative movement in Kerala.

14. Therefore, I am of opinion that the delimitation of wards can be done only by the general body of the members of the Society and not by the managing committee.

15. Further Ext.P3 resolution was adopted only on 1.3.2007 long after Ext.R4(a) resolution on 27.1.2007. Going by the explanation to Section 69 (2)(c), the election process commences from the general body meeting for election. (Since the Act and Rules do not contemplate a general body meeting, what is intended here must be the Managing Committee meeting contemplated in Rules 35 and 35A) Therefore, after that meeting adopting resolution

to conduct election, in respect of the election, except to assist the returning officer, the managing committee cannot take any decision which would affect the election process. If at all any process like delimitation of wards has to be done, that has to be before the decision to conduct the election. That being so, Ext.P3 resolution adopted after Ext.R4(a) resolution is clearly an interference with the process of election, by the managing committee in power and therefore, Ext.P4 issued on the basis of Ext.P3 resolution is clearly vitiated.

16. There is one other aspect also which would render Ext.P4 susceptible to interference by this Court. As per bye-law 31(b) the number of members in the Director Board shall only be 9 out of whom two are to be nominees of the Deputy Registrar. But in Ext.P4, the number of members to be elected is shown as 9. In serial number 2, 7 wards are also mentioned. In addition to that one seat each is shown as reserved for SC/ST and women. Therefore,

as per Ext.P4, all the 9 seats are to be filled up by election, contrary to bye-law 31(b) which stipulates that 2 members are to be nominated by the Deputy Registrar. Of course in view of amendment of the 2nd proviso to Section 28(1) by Act 19 of 1987 read with Section 31(4) of the Act it may be presumed that Act 19 of 1987 takes away the power of the Government to nominate members even if the bye-law provides for the same. Even then, when the election has to be on ward basis, the election to seats reserved for SC/ST and women as per Section 28A also should be on ward basis. In other words, for 9 members there should be 9 wards and one each of the 9 wards should be reserved for SC/ST and women. It may be noted here that, that is how reservation of seats is made in elections to local bodies where elections are on ward basis. Ext.P4 does not mention the wards so reserved for SC/ST and women except that two members would be elected from constituencies reserved for SC/ST and women. This is clearly in violation of bye-law 31(b). From

Ext.P4 it is also not clear as to whether all the voters together would elect the member from each ward or whether voters from each ward would select the member to represent their ward. For these reasons also, Ext.P4 is an arbitrary exercise of power and an action of a statutory body in breach of law which would come within the 3rd conclusion in paragraph 32 of the Supreme Court decision in Ashok Kumar's case (supra), which would certainly give jurisdiction to this court to interfere with the election process initiated by Ext.R4(a) and continued by Ext.P3 and Ext.P4. This is all the more so, since this vital defect would go to the root of the election process itself. This is also an exceptional or extra-ordinary circumstance referred to in Gujarat University's case (supra) cited by the 4th respondent which would necessitate interference by this court under Article 226 of the Constitution of India to correct a patent illegality in the very initiation of the election process itself.

For the above reasons, I quash Exts.P3 and P4. Since admittedly Ext.R4(a) resolution to conduct the election has been adopted prior to the delimitation of wards by the general body, the same is also against the bye-laws and without authority of law. Therefore, I direct that a special general body meeting of the members of the Society be convened to fix the wards for election in accordance with the bye-laws, subject of course to Section 28A which stipulates for reservation of one seat each for SC/ST and women members, which shall be by reserving one each of the nine wards for them. This process shall be completed within 2 months and the election to the Director Board shall be completed within another two months from the date of the resolution of the general body fixing the wards. The above schedule shall be adhered to even if the administration of the Society is put under an Administrator/Administrative Committee by reason of the term of the present Board of Directors having been expired in the meantime.

The writ petition is allowed as above, but without any order as to costs.

Sd/-
sdk+ S.SIRI JAGAN, JUDGE

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P.A. to Judge.